IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0149

STATE OF MONTANA,

Plaintiff and Appellee,

v.

PAUL CLIFFORD GIESER,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the District Court of the Eighteenth Judicial District of the State of Montana, in and for the County of Gallatin,
The Honorable John Brown, District Judge, Presiding

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STATEMENT OF THE ISSUES

Under the Sixth Amendment of the United State's Constitution and Article II, Section 24, of the Montana Constitution, did the District Court violate Gieser's right of confrontation by limiting his cross-examination of Deputy Madsen?

Did the District Court improperly instruct the jury that if the "concentration of .08 or more, you are permitted, but not required to infer that the person was under the influence of alcohol" when this instruction directly contradicted another instruction and the evidence indicated that Gieser refused the breath test?

Did the District Court err when prohibiting Gieser from presenting jury instructions regarding the legal standards for the administration and validity of the preliminary alcohol screening test and the field sobriety tests when the evidence indicated that the tests were improperly administered?

Did the District Court err when it failed to instruct the jury to disregard Deputy Madsen's testimony regarding his prior stop of Gieser for driving under the influence of alcohol when the trial counsel did not object to this testimony?

Under Sixth Amendment of the United State Constitution, was Gieser afforded ineffective assistance of counsel when his trial counsel: (1) failed to file pre-trial motions to exclude evidence of the field sobriety tests; (2) failed to object to Deputy Madsen's testimony regarding the prior stop of Gieser; (3) failed to file a pre-trial motion to exclude or object to Deputy Madsen's testimony regarding the

blood alcohol content result from an uncertified preliminary alcohol screening test device; and (4) failed to be prepared at trial with jury instructions regarding the improperly administered preliminary alcohol screening test and field sobriety tests?

STATEMENT OF THE CASE

On April 17, 2008, the Defendant, Paul Clifford Gieser ("Gieser"), was arrested for Driving a Motor Vehicle while Under the Influence of Alcohol or Drugs, a Felony. *See generally State v. Gieser*, Cause No. DC-08-102C, Affidavit of Probable Cause and Motion for Leave to File Information (Mont. 18th Jud. Dist. Ct. May 2, 2008). This matter went to jury trial on June 3 and 4, 2009. Neither the State or the Defense filed pre-trial motions. The State presented the testimony of Michael Kelsey, who called 911 to report Gieser's driving, and Deputy Tom Madsen, the arresting officer. The jury ultimately found Gieser guilty of driving under the influence of alcohol.

STATEMENT OF THE FACTS

The facts relevant to this appeal follow.

On June 3 and 4, 2009, this matter was tried to a jury. The State offered the testimony of Deputy Tom Madsen, a deputy with the Gallatin County Sheriff's Office. *See State v. Gieser*, Cause No. Dc-08-102C, Transcript of Proceedings at p. 122 (Mont. 18th Jud. Dist. Ct. June 3-4, 2009) (hereinafter "Trial Tr.") (Appendix A). Upon stopping Gieser, Deputy Madsen conducted an investigation

for driving under the influence. *See* Trial Tr. at pp. 132-33. Deputy Madsen first requested that Gieser recite the alphabet from "C" to "X," and Gieser properly recited the alphabet from "C" to "Z." *See* Trial Tr. at p. 136, ll. 14-24.

When Deputy Madsen administered the Horizontal Gaze Nystagmus test ("HGN"), he placed the stimulus five to six inches from Gieser's face and extend the stimulus more than five to six inches to the side. *See* Trial Tr. at p. 185, ll. 16-19, p. 196, ll. 10-23. He testified that the National Highway Traffic Safety Administration ("NHTSA") Manual provides that:

> It is important to know how to estimate a 45 degree angle. How far you position the stimulus from the suspect's nose is a critical factor in estimating a 45 degree angle. If the stimulus is held 12 inches in front of the suspect's nose it should be moved 12 inches to the side to reach 45 degrees. Likewise, if the stimulus is held 15 inches in front of the suspect's nose, it should be moved 15 inches to the side to reach 45 degrees.

Trial Tr. at p. 195, ll. 25, p. 196, ll. 1-9. The State did not present expert testimony regarding the HGN. Gieser's trial counsel did not object to the admission into evidence of the HGN.

During the cross-examination of Deputy Madsen regarding this test, he testified that:

> Q. [Defense Counsel] Okay. After that test, did you ask him any questions before you performed the horizontal gaze nystagmus test?
> A. [Deputy Madsen] No, I did not.
> Q. Didn't you ask him if he wore glasses or contacts?
> A. No, I did not.

Q. I thought your sheet said you did.
A. That's because I've had prior contact with Mr. Gieser before on a previous DUI stop, ma'am.

Trial Tr. at 200, ll. 21-25, 201, ll. 1-6. Gieser's trial counsel did not object to this statement regarding the prior DUI stop. The State had previously indicated that it would not seek to admit evidence of prior acts. *See State v. Gieser*, Cause No. DC-08-102C, Omnibus Hearing Order at 2 (Mont. 18th Jud. Dist. Ct. Nov. 26, 2008) (hereinafter "Omnibus Hearing Order") (Appendix B).

Prior to performing the Walk and Turn test, Gieser informed Deputy Madsen that he had a bad back and walked with a cane. *See* Trial Tr. at p. 223, ll. 15-17, p. 229, ll. 9-24. Deputy Madsen also explained that the NHTSA Manual instructs that individuals with back and legs problems not take the Walk and Turn test. *See* Trial Tr. at p. 229, ll. 9-12.

Deputy Madsen's preliminary alcohol screening test ("PAST")[1] was out of certification at the time of this investigation. *See* Trial Tr. at p. 153, ll. 5-9, p. 233, ll. 1-5. Deputy Madsen was unable to receive a reading on a certified PAST. *See* Trial Tr. at pp. 154-55. Deputy Madsen did receive a reading on his uncertified PAST in the amount of .182. *See* Trial Tr. at p. 155, ll. 1-11. Gieser's trial counsel did not object to the admission into evidence of this reading. Deputy Madsen

[1] The District Court record refers to this initial breath test both as the preliminary breath test and the preliminary alcohol screening test ("PAST"). For consistency, this brief will refer to this initial breath test as PAST.

testified that this reading was "more than twice the legal limit… ." Trial Tr. at p. 155, ll. 12-14. The deputy conceded that he was concerned about his uncertified PAST. *See* Trial Tr. at p. 236, ll. 8-11. Deputy Madsen testified that "Mr. Gieser refused, basically, and that's what I should have wrote down on my refusal." Trial Tr. at p.234, ll. 23-25. Gieser also refused to submit to the Intoxalyzer 8000. *See* Trial Tr. at pp. 159-164.

During the trial, the District Court limited the cross-examination of Deputy Madsen regarding the specific requirements of administering the field sobriety tests consistent with the NHTSA Manual. *See* Trial Tr. at pp. 206-217. Specifically, the District Court prohibited Gieser's trial counsel from outlining the procedures in the manual. *See* Trial Tr. at pp. 207-208, 216. The District Court heard arguments from both counsel away from the jury regarding the specifics of this manual, and the State argued that Gieser's trial counsel should have filed pre-trial motions to challenge Deputy Madsen's compliance with the manual. *See* Trial Tr. at 206-217.

The District Court provided the jury with the following two instructions regarding the breath tests:

> You are instructed that it is permissible for the State to offer evidence that the Defendant was offered and refused a breath test providing the Defendant has first been made aware of the nature of the test and its purpose. The Defendant has no Constitutional right to refuse to submit to such a test.

> You may infer from evidence of the Defendant's refusal that he was under the influence; however, that inference is rebuttable.
>
> Whether or not the Defendant's refusal shows a consciousness of guilt and the significance to be attached to his refusal are matters for your determination.
>
> The concentration of alcohol in the person at the time of a test as shown by analysis of a sample of the person's blood or breath drawn or taken within a reasonable time after the alleged act, gives rise to the following inference:
>
> If there was at that time an alcohol concentration of .08 or more, you are permitted, but not required to infer that the person was under the influence of alcohol. It is your exclusive province to determine whether the facts and circumstances shown by the evidence warrant the inference to be drawn by you and the inference is rebuttable.

Trial Tr. at 300-01. Gieser's trial counsel objected to the instruction that: "If there was at that time an alcohol concentration of .08 or more, you are permitted, but not required to infer that the person was under the influence of alcohol." Trial Tr. at pp. 281-82.

Gieser's trial counsel did not present the District Court with jury instructions regarding the legal requirements for administering the field sobriety tests and PAST. Gieser's trial counsel also did not file any pre-trial motions. *See* Omnibus Hearing Order at 3-4.

Ultimately, the jury found Gieser guilty of driving under the influence of alcohol. *See* Trial Tr. at p. 333, ll. 10-12.

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SUMMARY OF ARGUMENT

The Sixth Amendment of the United State Constitution and Article II, Section 24, of the Montana Constitution, affords defendants the ability to confront adverse witnesses. A District Court may however, limit cross-examinations to relevant issues at trial. *See State v. Beavers*, 1999 MT 260, ¶ 36, 296 Mont. 340, 987 P.2d 371. Here, the District Court limited Gieser's cross-examination of Deputy Madsen by prohibiting him from questioning Deputy Madsen regarding the specific procedures in the NHTSA Manual. *See* Trial Tr. at pp. 207-08, 216. Any deviations from the NHTSA Manual standards renders the validity of the tests compromised. *See State v. Homan*, 732 N.E.2d 952, 956 (Ohio 2000); *City of Missoula v. Robertson*, 2000 MT 52, ¶ 44, 298 Mont. 419, 998 P.2d 144. The District Court erred in not allowing Gieser to question Deputy Madsen regarding the specific procedures of the NHTSA Manual because such information was highly relevant to the ultimate determination of whether Gieser was under the influence of alcohol.

The District Court also improperly instructed the jury by offering inconsistent jury instructions and a jury instruction not supported by the evidence at trial. *See* Trial Tr. at pp. 300-01. Gieser refused the breath test; therefore the District Court could not offer an instruction regarding the presumption of his blood alcohol content. *See* Trial. Tr. at p. 234, ll. 23-25, pp. 159-164; *Brothers v. Surplus*

Tractor Parts Corp., (1973) 161 Mont. 412, 416, 506 P.2d 1362, 1364. Furthermore, the PAST device used on Gieser was an uncertified device, which could not be used on Gieser. *See* Trial Tr. at p. 153, ll. 5-9, p. 154, ll. 24-25, p. 155, ll. 1-11, p. 233, ll. 1-5, p. 236, ll. 8-11; § 61-8-409, MCA (2009).

The District Court also erred when not allowing Gieser to submit a jury instruction regarding the legal standards of the validity of the field sobriety tests and the PAST. *See* Trial Tr. at pp. 153, 187-97, 229, 236. The legal standards are: (1) the PAST cannot be administered on an uncertified device; and (2) the validity of the field sobriety tests is compromised when any of the standardized elements are changed. *See* § 61-8-409, MCA; *Homan*, 732 N.E.2d at 956; *Robertson*, ¶ 44. The District Court should have instructed the jury on every issued supported by the evidence, including the legal standards on the administration of the field sobriety tests and PAST. *See Beavers*, ¶ 23.

The District Court erred when it did not instruct the jury to disregard Deputy Madsen's testimony regarding a previous DUI stop with Mr. Gieser. *See* Trial Tr. at p. 200, ll. 21-25, p. 201, ll. 1-6; *State v. Long*, 2005 MT 130, ¶ 25, 327 Mont 238, 113 P.3d 290. Given the highly prejudicial nature of this testimony, the District Court had a duty to *sua sponte* instruct the jury to disregard this information. *See State v. Stroud*, (1984) 210 Mont. 58, 73, 683 P.2d 459, 467.

In the alternative, if this Court does not reverse based upon the legal issues outlined above, Gieser was afforded ineffective assistance of counsel in violation of his Sixth Amendment right to counsel because: (1) Gieser's trial counsel failed to file pre-trial motions to exclude from evidence the field sobriety tests; (2) failed to object to Deputy Madsen's testimony regarding a prior DUI stop with Gieser; (3) failed to object to admitting or file a pre-trial motion to exclude the result of the uncertified PAST; and (4) failed to be prepared at trial with jury instructions regarding the legal standards of the administration of the field sobriety tests and PAST. *See* Trial Tr. at pp. 155, 185, 195-96, 201, 206-17, 223, 229, 258-61; *Hagen v. State*, 1999 MT 8, ¶¶ 10, 12, 293 Mont. 60, 973 P.2d 233. Had Gieser's trial counsel taken the above actions, the State's evidence would have been extremely limited at trial, creating a high probability for a different result. Thus, Gieser was prejudiced by his trial counsel's deficient performance.

In sum, for the above stated reasons, this Court should reverse the conviction of Gieser and remand this matter for a new trial.

ARGUMENT

I. Standard of Review

This Court reviews a district court's discretionary rulings on an abuse of discretion standard. *See State v. Beavers*, 1999 MT 260, ¶ 20, 296 Mont. 340, 987 P.2d 371. Jury instructions and the scope of cross-examination are given broad

discretion. *Id*. Claims of ineffective assistance of counsel are mixed questions of law and fact that this Court reviews de novo. *See State v. Rovin*, 2009 MT 16, ¶ 24, 349 Mont. 57, 201 P.3d 780.

II. The District Court violated Gieser's right of confrontation when it limited Gieser's cross-examination of the Deputy Madsen.

During the jury trial, the District Court limited Gieser's ability to cross-examine Deputy Madsen regarding his administration of the Horizontal Gaze Nystagmus ("HGN") and Walk and Turn (collectively "field sobriety tests") consistent with the National Highway Traffic Safety Administration ("NHSTA") Manual, which in effect limited Gieser's ability to confront Deputy Madsen. *See* Trial Tr. at pp. 206-217.

The Sixth Amendment of the United State Constitution and Article II, Section 24, of the Montana Constitution, afford a defendant the right to confront and cross-examine an adverse witness. However, the District Court "has broad discretion to limit the scope of cross-examination to those issues it determines are relevant to the trial." *Beavers*, ¶ 36.

> Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant.

M.R.Evid. 401.

The validity of the field sobriety tests relies on the execution of the tests. The NHTSA Manual outlines specific procedures on how to administer the field sobriety tests. While this Court has not had the opportunity to specifically examine the reliability of the field sobriety tests as it relates to the NHTSA Manual, other state courts have explained that:

> According to the NHTSA, '[i]f any one of the standardized field sobriety test elements is changed, the validity is compromised.' Experts in the areas of drunk driving apprehension, prosecution, and defense all appear to agree that the reliability of field sobriety test results does indeed turn upon the degree to which police comply with standardized testing procedures.

State v. Homan, 732 N.E.2d 952, 956 (Ohio 2000) (overruled by subsequent statute) (citing 1 Erwin, Defense of Drunk Driving Cases (3 Ed.1997), Section 10.06 [4]; Cohen & Green, Apprehending and Prosecuting the Drunk Driver: A Manual for Police and Prosecution (1997), Section 4.01.). The Ohio Court also explained that NHTSA is the "leader in the study and development of field sobriety testing policy and procedure. The NHTSA's standardized test manuals form the basis for manuals used by state law enforcement agencies across the country." *Id*. at 956, n 4. The Ohio Court concluded that the "small margins of error that characterize field sobriety tests make strict compliance critical." *Id*. at 956.

Consistent with *Homan*, this Court has explained that to admit the results for HGN the State must first "show[] that the [HGN] was properly administered … ."

City of Missoula v. Robertson, 2000 MT 52, ¶ 44, 298 Mont. 419, 998 P.2d 144 (citing *Hulse v. State*, 1998 MT 108, ¶ 72, 289 Mont. 1, 961 P.2d 75). Regardless of how small the deviation from the procedures, such deviations render the test invalid. *See Homan*, 732 N.E.2d at 956; *Robertson*, ¶ 44. Improper execution of the field sobriety maneuvers invalidates the results.

Whether Deputy Madsen properly administered the field sobriety tests epitomizes relevancy because it directly leads to the validity of the tests. Determining the validity of the field sobriety tests is of the utmost importance because the results of the tests are used to conclude whether Gieser was under the influence of alcohol. If the tests are invalid, that information is relevant for the jury to determine the extent of credibility they should afford the tests because the ultimate conclusion to be derived from these tests is whether Gieser was under the influence of alcohol.

Gieser attempted to cross-examine Deputy Madsen regarding whether he complied with the procedures outlined in the NHTSA manual. However, the District Court prohibited Gieser from specifying the procedures of the NHTSA manual. *See* Trial Tr. at pp. 207-208, 216. The content of the NHTSA manual was highly relevant for the jury to understand exactly how Deputy Madsen violated the procedures. The District Court abused its discretion when prohibiting Gieser from cross-examining Deputy Madsen on the precise language of the violated NHTSA

procedures. Consequently, this Court should reverse Gieser's conviction and remand this matter for a new trial.

III. The District Court improperly instructed the jury.

This Court "review[s] jury instructions to determine whether the instructions as a whole fully and fairly instruct the jury on the applicable law. A district court has broad discretion in formulating jury instructions, and our standard of review is whether the court abused that discretion." *State v. Pittman*, 2005 MT 70, ¶ 30, 326 Mont. 324, 109 P.3d 237.

A. The District Court erred when instructing the jury regarding the results of the PAST.

The District Court instructed the jury that:

> You are instructed that it is permissible for the State to offer evidence that the Defendant was offered and refused a breath test providing the Defendant has first been made aware of the nature of the test and its purpose. The Defendant has no Constitutional right to refuse to submit to such a test.
>
> You may infer from evidence of the *Defendant's refusal that he was under the influence; however, that inference is rebuttable*.
>
> Whether or not the Defendant's refusal shows a consciousness of guilt and the significance to be attached to his refusal are matters for your determination.

Trial Tr. at p. 300 (emphasis added) (hereinafter "Refusal Instruction"). The District Court also instructed jury that:

> The concentration of alcohol in the person at the time of a test as shown by analysis of a sample of the person's blood or breath

> drawn or taken within a reasonable time after the alleged act, gives rise to the following inference:
>
> If there was at that time an alcohol *concentration of .08 or more, you are permitted, but not required to infer that the person was under the influence of alcohol*. It is your exclusive province to determine whether the facts and circumstances shown by the evidence warrant the inference to be drawn by you and the *inference is rebuttable*.

See Trial Tr. at pp. 300-01 (emphasis added) (hereinafter "BAC Instruction").

An individual either submits to the breath test or refuses the breath test. A defendant cannot do both. *See* §§ 61-8-401, 61-8-402, MCA (2009). This Court has also explained that reversal is required when "the jury instructions, taken as a whole, [are] inconsistent and contradictory to each other to a degree that would confuse the average juryman." *Brothers v. Surplus Tractor Parts Corp*., (1973) 161 Mont. 412, 416, 506 P.2d 1362, 1364.

Deputy Madsen testified that "Mr. Gieser refused, basically, and that's what I should have wrote down on my refusal." Trial Tr. at p. 234, ll. 23-25; *see also* Trial Tr. at pp. 159-164 (discussing Gieser's refusal of the Intoxalyzer 8000). Deputy Madsen made clear that Gieser refused to submit to any of the breath tests offered during the investigation.

Despite the testimony that Gieser refused the breath tests, the District Court gave the jury the BAC Instruction. This instruction is inconsistent with the facts presented at trial. The only logical result from refusing the breath tests is that the

officer did not receive a valid alcohol concentration result. The District Court could not give the BAC Instruction because that presumption does not apply and is not the applicable law.

Additionally, the BAC Instruction directly contradicted the Refusal Instruction. Presenting these conflicting instructions reasonably "would confuse the average juryman." *See Brothers*, 161 Mont. at 416, 506 P.2d at 1364.

Presenting the jury with both of these instructions unfairly prejudiced Gieser because the District Court instructed the jury there are two presumptions that Gieser was under the influence of alcohol. Because these two instructions are mutually exclusive, the jury should have been instructed that the there is one presumption of intoxication, not two presumptions.

In sum, the District Court erred in presenting the jury with both the Refusal Instruction and the BAC Instruction; and consequently, this matter should be reversed.

The State may argue that the BAC Instruction was proper because Gieser did not refuse to submit to the breath test. This argument lacks merit.

The Montana legislature has explained that the preliminary alcohol screening test ("PAST") "may not be conducted or requested under this section unless both the peace officer and the instrument used to conduct the preliminary alcohol screening test have been certified by the department pursuant to rules

adopted under the authority of 61-8-405(5)." § 61-8-409, MCA. Montana's Administrative Rules further provide that: "All devices meeting the definition of 'associated equipment' contained in ARM 23.4.201(8)(b) shall be field certified for accuracy at least once every 31 days by a breath test specialist who has received training approved by the division in the proper methods for conducting such analyses." Mont.Admin.R. 23.4.213(2); *see also* Mont.Admin.R. 23.4.201(8)(b) (defining "associated equipment" as: "any approved device which is designed to detect and verify the presence of alcohol or provide an estimated value of alcohol concentration, i.e., a PAST device"). Therefore, the PAST cannot be conducted or requested unless the PAST device was certified every 31 days.

Deputy Madsen conceded that his PAST devise was out of certification. *See* Trial Tr. at p. 153, ll. 5-9, p. 233, ll. 1-5. The only blood alcohol content reading received was on an uncertified PAST devise. *See* Trial Tr. at p. 154, ll. 24-25, p. 155, ll. 1-11. On cross-examination, Deputy Madsen continued:

> Q. [Defense Counsel] But it doesn't concern you at all that your PBT wasn't certified?
>
> A. [Deputy Madsen] It does concern me. I made a mistake. I should not have used my PBT at all. I have just written refusal on the report and taken him to the jail at that time.

Trial Tr. at p. 236, ll. 8-11.

The only PAST result occurred on an uncertified device. Montana law prohibited Deputy Madsen from conducting or requesting submission to this test.

Thus, Montana law prohibited the District Court from offering the BAC Instruction because the PAST should not have been administered.

In sum, this Court should reverse Gieser's conviction and remand for a new trial because the District Court improperly instructed the jury on the BAC Instruction.

B. The District Court erred when it did not allow defense counsel the opportunity to present jury instructions regarding the invalidity of the field sobriety tests and the PAST.

The District Court prohibited Gieser from offering a jury instruction regarding the invalidity of the field sobriety tests and PAST. "It is a fundamental rule that a criminal defendant is entitled to jury instructions that cover every issue or theory having support in the evidence." *See Beavers*, ¶ 23.

As discussed above, Deputy Madsen did not administer the HGN, Walk and Turn, and PAST consistent with the NHTSA manual or Montana law. *See* Trial Tr. at pp. 157, 187-197, 229, 236; *see also Homan*, 732 N.E.2d at 956; *Robertson*, ¶ 44; § 61-8-409, MCA. Because of these failures, Gieser was entitled to the opportunity for the jury to apply these facts to the law. The guiding law was: (1) PAST cannot be administered on an uncertified device; and (2) the validity of the field sobriety tests is compromised if the "any one of the standardized field sobriety test elements is changed." *See* § 61-8-409, MCA; *Homan*, 732 N.E.2d at 956; *Robertson*, ¶ 44. The jury should apply this evidence to the proper legal

standards. Consequently, these legal standards should have been presented to the jury for them to determine whether the facts of this matter apply to this law—i.e. under the law, were the field sobriety tests and PAST invalid. For these errors, this Court should reverse Gieser's conviction and remand this matter for a new trial.

IV. The District Court erred when it did not instruct the jury to disregard the Deputy Madsen's testimony regarding a prior contact with Gieser.

During his cross-examination, Deputy Madsen gratuitously testified as follows:

Q. [Defense Counsel] Okay. After that test, did you ask him any questions before you performed the horizontal gaze nystagmus test?

A. [Deputy Madsen] No, I did not.

Q. Didn't you ask him if he wore glasses or contacts?

A. No, I did not.

Q. I thought your sheet said you did.

A. That's because I've had prior contact with Mr. Gieser before on a previous DUI stop, ma'am.

Trial Tr. at p. 200, ll. 21-25, p. 201, ll. 1-6.

This Court has explained that the "general rule is that evidence of other crimes or prior acts must be excluded [because] prior acts or crimes are highly prejudicial to the defendant, and usually irrelevant for purposes of the charged

crime." *State v. Croteau*, (1991) 248 Mont. 403, 407, 812 P.2d 1251, 1253. This Court further determined that this:

> general rule should be *strictly enforced* in all cases where applicable, because of the prejudicial effect and injustice of such evidence, and should not be departed from except under conditions which clearly justify such a departure. Evidence of a defendant's prior acts … *creates the risk that the jury will penalize a defendant simply for his past bad character*.

248 Mont. at 407-08, 812 P.2d at 1253 (emphasis added) (citing cases). Because of this logic, courts should only rarely admit evidence of prior criminal acts.

To admit evidence of prior criminal acts, the State must satisfy both procedural and substantive safeguards. *See State v. Johnston*, (1994) 267 Mont. 474, 478-79, 885 P.2d 402, 404-05. If the State intends to use prior criminal acts, the State must provide notice to the defense. *Id*. However, in the event that improper testimony occurs at trial, this Court has explained "that the general rule is that where the trial judge withdraws or strikes improper testimony from the record with an accompanying cautionary instruction to the jury, any error committed by its introduction is presumed cured." *State v. Long*, 2005 MT 130, ¶ 25, 327 Mont. 238, 113 P.3d 290.

Here, the State notified the Court and defense that it would not offer evidence of prior acts. *See* Omnibus Hearing Order at 2. However, the State's witness, Deputy Madsen testified regarding a prior DUI stop involving Gieser. In

response to this highly prejudicial information, the District Court should have *sua sponte* instructed the jury to disregard this information.

The State may argue that absent an objection to by the defense, the Court has no duty to *sua sponte* instruct the jury to disregard the testimony. This Court has explained that "once the State has given notice under *Just* that it will introduce evidence of other crimes or acts, the remaining procedures become mandatory only upon defendant's objection and/or request. As the court did in *Forsman*, we remind trial judges that admonition of the jury still should be done *sua sponte*." *State v. Stroud*, (1984) 210 Mont. 58, 73, 683 P.2d 459, 467. Here, the State did not provide *Just* notice. Thus, the Defense was not notified that Deputy Madsen would testify regarding his prior stop of Gieser. This lack of notice distinguishes *Stroud* from this matter. Regardless, the importance of ensuring a fair trial and that the jury will not punish Gieser for past acts mandates that the policy of a *sua sponte* instruction from the District Court still occur. This violation of Gieser's rights requires this Court to reverse his conviction and remand for a new trial.

V. In the alternative, Gieser was afforded ineffective assistance of counsel.

In the alternative to the above arguments, this Court should reverse Gieser's conviction because he was afforded ineffective assistance of counsel. The Montana Code Annotated provides that:

> When a petitioner has been afforded the opportunity for a direct appeal of the petitioner's conviction, grounds for relief that were or could reasonably have been raised on direct appeal may not be raised, considered, or decided in a proceeding brought under this chapter. Ineffectiveness or incompetence of counsel in proceedings on an original or an amended original petition under this part may not be raised in a second or subsequent petition under this part.

§ 46-21-105(2), MCA.

> [W]here ineffective assistance of counsel claims are based on facts of record in the underlying case, they must be raised in the direct appeal; conversely, where the allegations of ineffective assistance of counsel cannot be documented from the record in the underlying case, those claims must be raised by petition for postconviction relief.

Hagen v. State, 1999 MT 8, ¶ 12, 293 Mont. 60, 973 P.2d 233. The ineffective assistance of counsel claims presented here are appropriate on this direct appeal because the record documents these claims.

The following two part test must be satisfied to pursue claims of ineffective assistance of counsel: "[1] that counsel's performance was deficient and [2] that the deficient performance prejudiced the defense." *Id*. ¶ 10. Deficient performance by counsel is such that "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *State v. Kolberg*, (1990) 241 Mont. 105, 109, 785 P.2d 702, 704 (citing cases). There must be a "reasonable probability that, but for counsel's unprofessional errors, the result of a proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the

outcome." *State v. Probert*, (1986) 221 Mont. 476, 481, 719 P.2d 783, 786. When the defendant has been afforded ineffective assistance of counsel, the proper remedy is a new trial. *See Yecovenk v. State*, 2007 MT 338, ¶ 24, 340 Mont. 251, 173 P.3d 684.

A. Gieser received ineffective assistance of counsel because his trial counsel failed to file pretrial motions.

Gieser's trial counsel did not file any pre-trial motions in this matter. *See* Omnibus Hearing Order at 3-4. During the trial, the State argued that Gieser's ability to challenge Deputy Madsen's compliance with the NHTSA Manual was a matter for pre-trial motions. *See* Trial Tr. at pp. 206-217. As a result, the District Court limited Gieser's cross-examination of Deputy Madsen. *Id*. Gieser's trial counsel should have filed a motion in limine to exclude the HGN, Walk and Turn, and PAST from being admitted at trial because these motions would have likely been successful the following reasons.

The Montana Supreme Court has explained that "the authority to grant or deny a motion in limine 'rests in the inherent power of the court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties.'" *Hulse v. State*, 1998 MT 108, ¶ 15, 289 Mont. 1, 961 P.2d 75 (citations omitted). "The purpose of a motion in limine is to prevent the introduction of evidence which is irrelevant, immaterial, or unfairly prejudicial."

Id. A motion in limine is precisely the time when the Court may make preliminary determinations regarding whether "evidence may be excluded if its probative value is substantially *outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury … ." M.R.Evid. 403. The primary purpose of a motion in limine is to allow the Court to exclude evidence that is unfairly prejudicial or may mislead the jury – which requires the Court to weigh such against the probative value of the evidence.

The validity of the field sobriety tests relies on the execution of the tests. The NHTSA Manual outlines specific procedures on how to administer the field sobriety tests.

> According to the NHTSA, '[i]f any one of the standardized field sobriety test elements is changed, the validity is compromised.' Experts in the areas of drunk driving apprehension, prosecution, and defense all appear to agree that the reliability of field sobriety test results does indeed turn upon the degree to which police comply with standardized testing procedures.

Homan, 732 N.E.2d at 956 (overruled by subsequent statute) (citing 1 Erwin, Defense of Drunk Driving Cases (3 Ed.1997), Section 10.06 [4]; Cohen & Green, Apprehending and Prosecuting the Drunk Driver: A Manual for Police and Prosecution (1997), Section 4.01.). The Ohio Court also explained that NHTSA is the "leader in the study and development of field sobriety testing policy and procedure. The NHTSA's standardized test manuals form the basis for manuals

used by state law enforcement agencies across the country." *Id*. at 956, n 4. The Ohio Court concluded that the "small margins of error that characterize field sobriety tests make strict compliance critical." *Id*. at 956.

Consistent with *Homan*, this Court has also explained that to admit the results for HGN the State must first "show[] that the [HGN] was properly administered … ." *Robertson*, ¶ 44, (citing *Hulse*, ¶ 72). Regardless of how small the deviation from the procedures, such deviations renders the test invalid. *See Homan*, 732 N.E.2d at 956; *Robertson*, at ¶ 44. Improper execution of the HGN invalidates the results.

The NHTSA manual explains that in the administration of the HGN:

> It is important to know how to estimate a 45 degree angle. How far you position the stimulus from the suspect's nose is a *critical* factor in estimating a 45 degree angle. If the stimulus is held 12 inches in front of the suspect's nose it should be moved 12 inches to the side to reach 45 degrees. Likewise, if the stimulus is held 15 inches in front of the suspect's nose it should be moved 15 inches to the side to reach 45 degrees.

Trial Tr. at p. 195, l. 25, p. 196, ll. 1-9 (emphasis added).

Deputy Madsen testified that he had the stimulus five to six inches from Gieser's face and that he moved the stimulus farther than five to six inches to the side. *See* Trial Tr. at p. 185, ll. 16-19, p. 196, ll. 10-23. Deputy Madsen did not administer the field sobriety tests consistent with NHTSA because he did not

achieve the "critical" 45 degrees. This mistake mandates that the HGN was improperly administered and that the results are unreliable.

Gieser also walked with a cane and had a bad back. *See* Trial Tr. at p. 223, ll. 15-17, p. 229, ll. 9-24. According to the NHTSA Manual, people with back and leg problems should not take the Walk and Turn test. *See* Trial Tr. at p. 229, ll. 9-12. Again the results of the Walk and Turn are unreliable due to the failure to comply with the NHTSA Manual.

Due to the failures in the administration of the field sobriety tests, the tests were unreliable and have little, if any, probative value. Therefore, had Gieser's trial counsel moved to exclude this evidence at trial, the District Court should have excluded all evidence of or reference to the administration and results of the HGN and Walk and Turn because admitting such would be unfairly prejudicial and immaterial.

Additionally, the "underlying scientific principle of the HGN test" explains the correlation between alcohol consumption and nystagmus, and consequently, explanation of such is necessary for admission of the HGN results as evidence. *See Hulse*, ¶ 72. In *Robertson*, the Montana Supreme Court explained that:

> In *Hulse* ..., this Court held that in order to lay the proper foundation for admitting the results of the HGN test, the State, in addition to showing that the test was properly administered, must also establish a scientific basis for the reliability of the test results. We stated in *Hulse* that an

> expert explaining "the correlation between alcohol consumption and nystagmus, the underlying scientific basis of the HGN test" must be offered prior to the introduction into evidence of HGN test results.

Id. ¶ 44 (citing *Hulse* ¶ 72) (internal footnote omitted). Consequently, to admit evidence that the officer administered the HGN test and the subsequent results, the State should have presented expert testimony explaining the underlying scientific basis of the test. The State did not notice any expert witnesses or present any expert witness testimony at trial. The State also did not present testimony of the "the correlation between alcohol consumption and nystagmus, the underlying scientific basis of the HGN test." *Id*. Gieser's trial counsel should have moved to exclude this information at trial through a motion in limine and/or objection at trial. Montana law requires that the District Court to grant such motion and/or objection.

Had Gieser's trial counsel filed pre-trial motions to exclude the field sobriety tests, as the above case law indicates, Montana law requires that the District Court exclude this evidence. Without being able to admit the field sobriety tests at trial, the State's evidence would have been significantly limited. These tests provided the bulk of the evidence against Gieser, and without such, there is a reasonable probability that the jury would have had insufficient evidence to find Gieser guilty of driving under the influence of alcohol. Because the State would have only had

very limited evidence to present at trial, the confidence in the outcome is sufficiently undermined.

Consequently, this Court should reverse Gieser's conviction and remand this matter for a new trial.

B. Gieser received ineffective assistance of counsel because his trial counsel did not object to Deputy Madsen's testimony.

"The absence of an objection by counsel-that is, a failure to object-is a fact easily documented by reviewing the record, and we have decided claims of this kind on direct appeal on numerous occasions." *Hagen,* ¶ 20 (citing cases).

1. Gieser's trial counsel failed to object to Deputy Madsen's testimony regarding the prior DUI stop.

Gieser's trial counsel did not object when Deputy Madsen testified: "That's because I've had prior contact with Mr. Gieser before on a previous DUI stop, ma'am." Trial Tr. at p. 201, ll. 4-6. If this Court does not determine that the District Court had a *sua sponte* duty to instruct the jury to disregard this testimony, Gieser's trial counsel had the obligation to object to such statement and request that it be stricken from the record. *See Stroud*, 210 Mont. at 73, 683 P.2d at 467.

It is widely recognized that prior bad acts have a prejudicial effect on a jury, and that the rule prohibiting evidence of such "should be strictly enforced in all cases where applicable, because of the prejudicial effect and injustice of such evidence … ." *State v. Derbyshire*, 2009 MT 27, ¶ 22, 349 Mont. 114, 201 P.3d

811. When evidence of prior acts is inadvertently introduced at trial, this Court has also guided that the proper procedures to protect a fair trial are the defense objecting to the statement outside of the presence of the jury and "the court [instructing] the jury to disregard the last statement made by the witness." *State v. Long*, 2005 MT 130, ¶ 26, 327 Mont 238, 113 P.3d 290. Here, the Gieser's trial counsel failed to take the necessary first step to ensure a fair trial—object to the statement. This failure is a serious deficiency in affording Gieser his Constitutional right to counsel.

But for this failure, it is probable that the outcome of Gieser's trial would have been different. Montana law clearly outlines the high probability of prejudice to a defendant when the admission of other acts are admitted at trial. *See generally Derbyshire*, 2009 MT 27, 349 Mont. 114, 201 P.3d 811. It is accepted that the dangers of such evidence are that the defendant will be convicted simply because he was an "unsavory person" or the prior crimes evidence a "defect of character that makes him more likely" to commit the current offense. *Id*. ¶ 22. This logically proves even more true when the prior act is the same crime—as is the case here with a DUI. Given the universally accepted prejudice that prior acts has on a fair trial, it is clear that sufficient probability exists "to undermine confidence in the outcome of the trial." *Kolberg*, 241 Mont. at 109, 785 P.2d at 704.

Therefore, this Court should reverse Gieser's conviction and remand this matter for a new trial.

2. Gieser's trial counsel failed to object to Deputy Madsen's testimony or file a pre-trial motion regarding Gieser's blood alcohol content reading on the uncertified PAST.

Gieser's trial counsel also did not object to or file a pre-trial motion to exclude the admission into evidence of his blood alcohol content determined by the uncertified PAST. *See* Trial Tr. at p. 155, ll. 10-14. As outlined above, Deputy Madsen should not have requested that Gieser submit to PAST on an uncertified device. *See* § 61-8-409, MCA. Montana law is clear that the failure to certify a device mandates that the arresting officer cannot utilize such PAST device. *Id*. Gieser's trial counsel, however, did not object to or file a pre-trial motion to exclude the admission of the reading on this uncertified device despite the clear legal mandate to the contrary. Such failure again constitutes a serious deficiency.

Deputy Madsen testified that the PAST reading was twice the legal limit. *See* Trial Tr. at p. 155, ll. 12-14. Logically, this evidence was especially prejudicial to Gieser given that the other evidence presented at trial was an improperly administered HGN and Walk and Turn maneuvers, and a correctly recited alphabet. *See* Trial Tr. at pp. 136, 185, 196, 223, 229. The strongest evidence against Gieser was this invalid PAST reading. Again, had this reading been stricken from the record or not admitted, it is highly probable that the result

of the trial would have been different. Therefore, this Court should reverse the conviction of Gieser and remand this matter for a new trial.

C. Gieser received ineffective assistance of counsel because his trial counsel did not submit jury instructions regarding Deputy Madsen's failure to properly administer the field sobriety tests.

The record indicates that Gieser's trial counsel attended the trial without the necessary jury instructions regarding the requirement that Deputy Madsen administer the field sobriety tests and PAST consistent with the law. *See* Trial Tr. at pp. 258-261. As discussed in Section III.B., *supra*, the District Court should have instructed the jury that: (1) PAST cannot be administered on an uncertified device; and (2) the validity of the field sobriety tests is compromised if "any one of the standardized field sobriety test elements is changed." *See* § 61-8-409, MCA, *Homan*, 732 N.E.2d at 956; *Robertson*, ¶ 44. However, Gieser's trial counsel did not present the District Court with these proposed jury instructions. This failure evidences the trial counsel's failure to be prepared at trial with the necessary information to properly defend Gieser. Had Gieser's trial counsel been prepared with this information, it is probable that District Court would have properly instructed the jury. If the jury had been properly instructed regarding the legal standards upon which the field sobriety tests and PAST are to been administered, they would have fully understood the extent to which the results of these tests were invalid. Certainly, had the results of the tests been deemed invalid, the jury would

have had no evidence upon which determine that Gieser was under the influence of alcohol or to find Gieser guilty. Therefore, there is a high probability that had Gieser's trial counsel submitted these instructions that the outcome of this matter would have been different.

Therefore, this Court should reverse the conviction of Gieser and remand this matter for a new trial.

CONCLUSION

For the above stated reasons, Paul Clifford Gieser respectfully requests that this Court reverse his conviction and remand this matter to the District Court for a new trial.

Respectfully submitted this 28th day of June, 2010.

ANGEL, COIL & BARTLETT

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CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the above and foregoing were duly served upon each of the following parties or their counsel, by first class mail, on the 28th day of June, 2010, addressed as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except; and the word count calculated by Microsoft Word 2008, is not more than 10,000 words excluding certificate of service and certificate of compliance.

Dated this 28th day of June, 2010.

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